No. 02-1606

Supreme Court, U.S.
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In The
Supreme Court of the United States

TENNESSEE STUDENT
ASSISTANCE CORPORATION,

Petitioner,

v.

PAMELA L. HOOD,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether Congress has the authority under the Bankruptcy Clause, *U.S. Const.*, art. I, § 8, cl. 4, to abrogate the sovereign immunity of a state in order to permit a bankruptcy court to determine the dischargeability of a student loan.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	2
A. The Decision Below Is Clearly Correct	2
B. More Time is Required for the Issue to Ripen	6
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CASES	
Alden v. Maine, 527 U.S. 706 (1999)	3, 4
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	3, 5
Blodgett v. Holden, 275 U.S. 142 (1927)	7
Eleven State Medicaid Agencies v. CIT Group/Business Credit, Inc. (In re Sun Healthcare Group, Inc.), 2002 U.S. Dist. LEXIS 18128 (D. Del. 2002)	6
Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002)	5
In re NVR, LP, 189 F.3d 442 (4th Cir. 1999)	7
In re Tri-City Turf Club, Inc., 203 B.R. 617 (Bankr. E.D. Ky. 1996)	6
Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777 (4th Cir. 1997)	7
McCray v. New York, 461 U.S. 961 (1983)	8
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)	5
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)	*passim*
Texas v. Walker, 142 F.3d 813 (5th Cir. 1998)	7
CONSTITUTIONAL PROVISIONS	
U.S. Const., art. 1, § 8, cl. 4	1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine*, 74 Am. Bankr. L.J. 1 (Winter 2000) 8

The Federalist No. 32 (A. Hamilton) (G. Wills ed. 1982) 2, 3

STATEMENT OF THE CASE

The relevant facts are set forth in the Petition for a Writ of Certiorari (the "Petition") of the Tennessee Student Assistance Corporation ("Tennessee") and will not be repeated here. In the decision below, the Sixth Circuit affirmed the right of Congress to abrogate a state's sovereign immunity in section 106(a) of the Bankruptcy Code. The Sixth Circuit took cognizance of the holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) in which this Court ruled that the Eleventh Amendment barred Congress from abrogating the sovereign immunity of a state under the Commerce Clause, and generally denied Congress the power to abrogate a state's sovereign immunity under Article I. *See* Pet. App. at 8-11.[1]

The court below found that the distinctive language in the Bankruptcy Clause requiring "uniform Laws," *U.S. Const.*, art. 1, § 8, cl. 4, and the historical record from the time of the framing of the Constitution justified the creation of an exception to the broad doctrine of state sovereign immunity set forth in dicta in *Seminole Tribe*. First, the Sixth Circuit took note of Chief Justice Marshall's recognition of the special importance of a requirement for uniform laws in the text of the Bankruptcy Clause. Pet. App. at 12-13. It then explained how that principle was recognized in subsequent Supreme Court decisions. Pet. App. at 13.

The Sixth Circuit analyzed Alexander Hamilton's special treatment of the uniformity requirement in *The*

[1] Page references to the appendix attached to the Petition are denoted as "Pet. App."

Federalist No. 32. Pet. App. at 14, 17-19, 21. It noted that Hamilton's *The Federalist No. 81* is a primary authority upon which the majority in *Seminole Tribe* relied to support a broad application of state sovereign immunity. Pet. App. at 21. However, it found that Hamilton recognized an exception to that principle in *The Federalist No. 32*, where the Constitution requires uniformity. Pet. App. at 19.

The Sixth Circuit concluded by explaining how the *amici*, representing more than sixteen states, had failed to show how the debates on the ratification of the Constitution provided any basis for denying the existence of a narrow, uniformity exception to the continued sovereign immunity of a state under the Constitution. Pet. App. at 19-21.

REASONS FOR DENYING THE PETITION

A. The Decision Below Is Clearly Correct.

Tennessee's argument is grounded in a non-binding footnote in *Seminole Tribe*, 517 U.S. at 72 n.16, in which Chief Justice Rhenquist expressed the view that Congress lacked the power under Article I to abrogate a state's Eleventh Amendment immunity in bankruptcy. Rather than ignoring the reasoning in *Seminole Tribe*, the court below expressly "engage[d] in ... [a] *Seminole Tribe* analysis." Pet. App. at 9. As recognized by the Court in *Seminole Tribe* and in countless decisions of the Court prior and subsequent to *Seminole Tribe*, the breadth of the Eleventh Amendment is defined not by its text, but by the Framers' understanding of a state's continued immunity from suit under the Constitution. The Court in *Seminole*

Tribe turned to *The Federalist No. 81* on three separate occasions to define that understanding, *see Seminole Tribe*, 517 U.S. at 54, 69, 70 n.13, as did the court below. Pet. App. at 17-19.

When addressing the power of Congress under the Bankruptcy Clause, the Sixth Circuit took cognizance of Alexander Hamilton's direction to his readers to consult *The Federalist No. 32*. Pet. App. at 18. In *The Federalist No. 32* Hamilton recognized that the protection of a state's sovereign immunity did not extend to those few areas in which the Constitution *expressly*: (i) granted a power exclusively to the federal government, (ii) denied a power to the states or (iii) required a uniform law, such as bankruptcy. *The Federalist No. 32* at 152-53 (A. Hamilton) (G. Wills ed. 1982).

Tennessee seeks to wrongfully discredit the Sixth Circuit's reliance on the historical record by linking that record with failed dissents in prior Supreme Court decisions. For example, Tennessee quotes extensively from Justice Brennan's minority opinion in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), *see* Petition at 12-13, in order to demonstrate that the "plan of the Convention" analysis referenced in *The Federalist Nos. 32* and *81* has been rejected. Tennessee ignores that a plan of the Convention analysis is the method by which this Court has extended the scope of the Eleventh Amendment beyond the limits of its text. For example in *Alden v. Maine*, 527 U.S. 706 (1999), the Court stated:

> [T]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear,

> the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.

Id. at 713.

Tennessee attempts to distort the issue by ignoring a crucial aspect of Justice Brennan's analysis. When Justice Brennan referred to the limitations on state sovereign immunity imposed by the plan of the Convention, he was referring to Congress's ability to abrogate a state's sovereign immunity with respect to *all* of the powers enumerated in Article I. In its excerpt from footnote 25 of Justice Brennan's *Atascadero* minority opinion, *see* Petition at 13, Tennessee seeks to obfuscate the issue by using an ellipsis to eliminate Justice Brennan's reference to Congress's enumerated powers as a whole.[2]

[2] The excerpt from footnote 25, including the deleted language, reads:

> n25 Hamilton used the phrase "plan of the convention" frequently as a synonym for the Constitution. In No. 32, the discussion of taxation to which Hamilton adverted in No. 81, Hamilton had said that "as the plan of the convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States." The Constitution had not delegated to the National Government the general power to define defenses to state-law causes of action; consequently, nothing in Article III abrogated state sovereign immunity in state-law causes of action in federal or state courts. On the other hand, the Constitution had delegated to the National Government a series of enumerated powers,

(Continued on following page)

It is clear that the Court in *Seminole Tribe* rejected Justice Brennan's proposed broad application of Congress's power to abrogate a state's sovereign immunity. However, it is also clear that such a broad surrender of state sovereign immunity also was not advocated by Alexander Hamilton. Instead, Hamilton maintained that Article I of the Constitution allowed for only those very limited abrogation powers identified in *The Federalist* 32, including a requirement for uniformity. This central element in *The Federalist No.* 32 is simply ignored by Tennessee in a transparent attempt to avoid directly addressing the Sixth Circuit's analysis.

Tennessee uses a similar technique to distort the Sixth Circuit's analysis of the Bankruptcy Clause's requirement for uniformity. Rather than directly analyzing the issue, it instead cites a case under the Commerce Clause, *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 767 (2002), as authority for the proposition that the requirement for uniformity in bankruptcy is without "constitutional significance." Petition at 14. It asserts that the Sixth Circuit's "view . . . squarely conflicts with this Court's holding in *Federal*

> and had made federal laws enacted pursuant thereto the supreme law of the land. Therefore, the States had surrendered their immunity from suit on federal causes of action when the Constitution was ratified . . .

Atascadero, 473 U.S. at 277 n.25 (citations omitted) (underlined language omitted from excerpt in Petition). This same reference to all of Congress's plenary powers under Article I was the subject of Justice Brennan's plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20 (1989), *overruled* by, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the other "plan of the Convention" authority relied upon by Tennessee. *See* Petition at 13-15.

Maritime Commission." Id. Tennessee simply ignores Judge Nelson's explicit statement in the opinion below that she was not relying upon "a mere congressional policy favoring uniformity across state borders . . . .[but] whether a constitutional uniformity requirement [expressly contained in the Bankruptcy Clause] itself authorizes Congress to abrogate state sovereign immunity." Pet. App. at 14. It is this express requirement for uniformity in the Bankruptcy Clause, a qualification absent from the Commerce Clause and almost all other of Congress's Article I powers, which allows Congress the power to abrogate a state's sovereign immunity in section 106(a) of the Bankruptcy Code in connection with the discharge of a student loan in section 523(a)(8).

B. More Time is Required for the Issue to Ripen.

The Sixth Circuit Court of Appeals was the first circuit court of appeals to correctly utilize the framework that this Court established in *Seminole Tribe* to analyze that opinion's applicability in bankruptcy, rather than simply relying upon broad expressions of legal doctrine in that opinion in the form of *dicta*. In addition, as recognized by Tennessee, *see* Petition at 16, the constitutional question at issue in this case goes far beyond whether Ms. Hood is barred from bringing an adversary proceeding to determine the dischargeability of her student loan. Instead, the issue of state sovereign immunity touches almost every essential function of a bankruptcy court: the automatic stay, *see In re Tri-City Turf Club, Inc.*, 203 B.R. 617 (Bankr. E.D. Ky. 1996) (sovereign immunity precludes enforcement of automatic stay); debtor-in-possession loans, *see Eleven State Medicaid Agencies v. CIT Group/Business Credit, Inc. (In re Sun Healthcare Group, Inc.)*, 2002 U.S.

Dist. LEXIS 18128 (D. Del. 2002) (lien granted to post-petition lender primes states' right of recoupment); chapter 11 plans, *see Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir. 1997) (Maryland bound by a transfer tax exemption provided in a chapter 11 plan); and discharge of a debt, *see Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied, sub nom. Walker v. Texas* 525 U.S. 1102 (1999) (discharge of debt to state did not violate Eleventh Amendment).

Tennessee is seeking a ruling from this Court that an act of Congress is unconstitutional, a task which Justice Holmes described as "the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927), *modified* 276 U.S. 594 (1928). Equally problematic is the failure of the circuit courts of appeal upon which Tennessee relies to formulate a consistent body of case law that reconciles the operation of the Bankruptcy Code with the broad application of state sovereign immunity that this Court advocated in *Seminole Tribe*. For example, in *In re NVR, LP,* 189 F.3d 442 (4th Cir. 1999), *cert. denied sub nom. NVR Homes Inc. v. Clerks of the Circuit Courts for Anne Arundel County*, 528 U.S. 1117 (2000), the Fourth Circuit Court of Appeals reconciled a contrary ruling in *Maryland v. Antonelli Creditors' Liquidating Trust,* 123 F.3d 777 (4th Cir. 1997), by finding that the declaratory relief being sought in *NVR Homes* was a disguised form of money judgment. *Id.* at 453. However, in *Seminole Tribe* and numerous other decisions, this Court has ruled that the type of relief being sought is

not determinative of whether a sovereign immunity defense applies.[3] *Seminole Tribe*, 517 U.S. at 58.

Tennessee has failed to identify any sound basis for overruling the decision by the Sixth Circuit. Rather than reviewing the rightly decided decision below, this Court's consideration of the issue would be illuminated by further examination of this question by other courts, which now have the advantage of the Sixth Circuit's analysis. For example, in supporting a denial of a petition for a writ of certiorari, Justice Stevens wrote:

> I believe that further consideration of the ... ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date.

See McCray v. New York, 461 U.S. 961, 962 (1983). After such analyses the basic conflicts between a state's sovereign immunity and the operation of the Bankruptcy Code will become even more apparent. In such a context, the Court would be in a far superior position to weigh the issues.

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[3] For a fuller examination of the contradictions in circuit court opinions alternatively upholding and denying the applicability of a state's sovereign immunity in bankruptcy, *see* Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine*, 74 Am. Bankr. L.J. 1, 18-23 (Winter 2000).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

May 29, 2003

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